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In the Supreme Court of the United States

OCTOBER TERM, 1967

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1292

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 387 F. 2d 79. The decision and order of the National Labor Relations Board (Pet. App. 24a-53a) are reported at 155 NLRB 319.

JURISDICTION

The decree of the court of appeals (Pet. App. 22a-23a) was entered on December 27, 1967. On Febru-

ary 20, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari until April 4, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether construction-site picketing directed at neutral subcontractors, where the union's dispute is only with the general contractor, constitutes unlawful secondary activity, without regard to whether the work being performed by the neutral employers is related to the normal operation of the primary employer's business.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix to the petition (p. 54a).

STATEMENT

Petitioner (the "Union") had a primary labor dispute with Markwell and Hartz, Inc. ("Markwell"), the general contractor for the expansion of a filtration plant at the East Jefferson Water Works, District No. 1, in Jefferson Parish, Louisiana (Pet. App. 25a-26a, 27a).[1] Although Markwell performed a sub-

[1] Markwell had a collective bargaining agreement, covering its own employees, with District 50 of the United Mine Workers of America, a labor organization not affiliated with peti-

stantial amount of the work on the project with its own employees, it subcontracted the balance to 19 specialty subcontractors, including Binnings and Barnes, who were engaged for the pile-driving and the electrical work, respectively (Pet. App. 26a; J.A. 46, 56, 7-8). Both Binnings and Barnes were parties to collective bargaining agreements with affiliates of the Union, and the Union had no dispute with them (Pet. App. 27a; J.A. 9).

The East Jefferson Water Works is surrounded by a chain-link fence containing four gates: two on its northern boundary, the eastern one of which is called the "main gate"; and two on its east side, the "warehouse gate" and the "rear gate" (Pet. App. 26a-27a). On October 17, 1963, the Union began picketing at these gates, with signs indicating what "the wage rates on this job should be" (including the rates for pile drivers and electricians), and stating that "Markwell and Hartz, General Contractor, Does Not Have A Signed Agreement With The Building and Construction Trades Council of New Orleans, AFL-CIO" (Pet. App. 27a; J.A. 77, 9).

On October 23, Markwell posted signs at the gates on the northern boundary and the warehouse gate indicating that they were for the use of the subcontractors, suppliers and freight lines making deliveries to the project, and not Markwell's employees; another sign at the rear gate indicated that it was for the use of Markwell's employees (Pet. App. 27a-28a; J.A. 38-39). The signs subsequently were changed so

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tioner (J.A. 16). "J.A." refers to the Joint Appendix in the court below.

that, by November 16, those at the northern gates and the warehouse gate contained the additional statement that Markwell's employees and suppliers, and carriers making deliveries to Markwell, were to use the rear gate only (Pet. App. 28a; J.A. 45-46, 68). Markwell notified the Union of this gate allocation, and also all suppliers and truck lines (Pet. App. 28a; J.A. 45, 68-69). There is no evidence that the gates were used in a manner inconsistent with this posting (Pet. App. 28a). Despite the clear delineation between subcontractors' entrances and exits and the rear gate used by those serving and servicing Markwell, the Union continued to picket the gates other than the rear gate until January 15, 1964, when the Board's Regional Director obtained a temporary injunction from the federal district court, under Section 10(l) of the Act (Pet. App. 27a; J.A. 8-9, 21). During the picketing, the employees of Binnings and Barnes declined to perform work on the project called for by their employers' subcontracts (Pet. App. 27a, 28a; J.A. 22-27, 29, 30-32, 39, 41, 48, 62-63, 65, 67-68, 73).

On the foregoing facts, the Board (with two members dissenting) concluded that, on and after November 16, the Union, by continuing to picket at the gates which had been reserved for the neutral subcontractors and their suppliers, exceeded the bounds of legitimate primary activity directed against Markwell and engaged in a deliberate effort to force Binnings and Barnes, who were secondary employers, to cease doing business with Markwell. Accordingly, the Board held that the Union thereby violated Section 8

(b)(4)(B) of the Act (Pet. App. 35a-39a). The Board ordered the Union to cease and desist from the unfair labor practices found, and to post appropriate notices (Pet. App. 39a-40a). The court of appeals (with one judge dissenting) sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-21a).

ARGUMENT

The decision of the court below is correct and is in accord with the view of the other court of appeals which has considered the same question.[2] There is thus no occasion for review by this Court.

1. In *National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, this Court held that, notwithstanding the close relationship between the general contractor and the various subcontractors on a construction project,[3] each was a neutral in a labor dispute involving the other and was thus entitled to the protection of the Act's secondary boycott provisions (now Section 8(b)(4)(B)). Accord, *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations*

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[2] *National Labor Relations Board* v. *Nashville Bldg. & Constr. Trades Council*, 383 F. 2d 562 (C.A. 6); see also *Orange Belt District Council of Painters No. 48* v. *National Labor Relations Board*, 361 F. 2d 70 (C.A. D.C.).

[3] See the dissenting opinion of Mr. Justice Douglas in *Denver*, 341 U.S. at 692-693. See also *Denver Bldg. & Constr. Trades Council* v. *National Labor Relations Board*, 186 F. 2d 326, 335-337 (C.A. D.C.); *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 181 F. 2d 34, 40-42 (C.A. 2) (dissenting opinion).

Board, 341 U.S. 694. At the same time, however, the Court recognized that the secondary boycott provisions must be administered so as to reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" (341 U.S. at 692).

The line between legitimate primary activity and unlawful secondary activity is relatively easy to draw where the primary and secondary employers have separate work sites.[4] A more difficult problem is presented in the construction project and other "common situs" cases—"situations where two employers were performing separate tasks on common premises" (*Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board (General Electric Corp.)*, 366 U.S. 667, 676-677). However, early in the development of the law under Section 8(b)(4), the Board evolved the *Moore Dry Dock* criteria[5] as aids in de-

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[4] Compare *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672, with *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 184 F. 2d 60 (C.A. 10), certiorari denied, 341 U.S. 947.

[5] In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549, where the primary employer's ship was temporarily located at the secondary employer's dock, the Board stated:

> In the kind of situation that exists in this case, we believe that picketing * * * is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on

terming whether picketing at a common situs is primary or secondary. The Board has since applied these criteria in all construction project cases—including situations where, as here, the primary dispute was with the general contractor.[6] Under the *Moore Dry Dock* criteria, the Board was warranted here in finding that the Union's continued picketing at the northern and warehouse gates, after they had been clearly reserved for the exclusive use of the neutral subcontractors and their employees and suppliers, constituted a deliberate effort to implicate those persons in the Union's dispute with Markwell, and hence was secondary activity.

2. Petitioner seeks to distinguish *Denver* on the ground that there the union's dispute was with a non-union subcontractor, whereas here "the objective of the picketing union was to raise the wages of the general contractor's employees to the area standards" (Pet. 21). However, even though petitioner had a primary dispute with Markwell over its failure to conform to area standards, it cannot further that dispute by exerting secondary pressure on the neutral

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the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *

[6] *Local Union No. 55 (PBM)*, 108 NLRB 363, enforced, 218 F. 2d 226 (C.A. 10); *Piezonki* v. *National Labor Relations Board*, 219 F. 2d 879 (C.A. 4); *Eau Claire Bldg. & Constr. Trades Council*, 122 NLRB 1341; *Hermandad de Trabajadores de la Construccion*, 127 NLRB 900.

subcontractors also working on the project. Here the Board found, and the court below agreed, that at least an object of the Union's picketing, on and after November 16, was to force neutrals Binnings and Barnes to cease doing business with Markwell (Pet. App. 7a-8a, 38a-39a).

Petitioner is on no firmer ground in seeking to distinguish *Denver* because here the picketing became unlawful only after the establishment of reserved gates (Pet. 22-23). In *Denver* it was apparent from the outset that the union was not conducting its picketing in a manner calculated to minimize the impact on the neutral contractors at the common situs (see 341 U.S. at 678-679). Here, on the other hand, since the Union picketed with signs which named Markwell as the target of its dispute, there was no basis for attributing a secondary objective to it until Markwell, in an effort further to minimize the impact of the picketing on the neutral subcontractors, reserved special gates for them and their suppliers and the Union continued to picket at those gates, instead of only at the gate reserved for Markwell and its suppliers. In short, that the picketing in *Denver* was secondary from its inception, while here it became secondary only after the establishment of the reserved gates, provides no sound basis for distinguishing the two cases.

3. Petitioner Union further contends that this Court's decision in *Local 761, Int'l Union of Electrical Workers* v. *National Labor Relations Board (General Electric Corp.)*, 366 U.S. 667, qualified or overruled the *Denver* case. That holding, petitioner as-

serts, has imposed an additional requirement before secondary activity can properly be found—*i.e.*, it must be shown that the neutral employer was performing work which was "unrelated" to the normal operation of the primary employer's business. In so urging, we submit, petitioner misconceives the scope of that decision.

In *General Electric*, the union representing the production and maintenance employees at the company's Louisville plant called a strike over contract terms and established picket lines at the various gates of the plant. The company, in addition to receiving deliveries and supplies from neutral employers, as do all manufacturing plants, also had at work on its premises a number of independent contractors who, with their employees, were performing a variety of tasks ranging from construction of new buildings to general maintenance work (366 U.S. at 669). The company, in an effort to minimize the impact of the picketing on these independent contractors, set aside a separate gate exclusively for their use. In these circumstances, this Court rejected the broader contentions of the parties respecting the basis for determining whether the picketing was primary or secondary. It held that the "legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor prac-

tice * * *" (*United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 496-498, explaining the *General Electric* decision).

It is our view that the "related work" concept enunciated in *General Electric* was designed to meet the special problem presented where some of the independent contractors at work on the primary employer's premises are performing work directly connected with his day-to-day operations (*e.g.*, routine maintenance), while others are performing work of a more long-range nature (*e.g.*, capital improvements). Since the "primary strike * * * is aimed at applying economic pressure by halting the day-to-day operations of the struck employer" (*Carrier Corp.*, *supra*, 376 U.S. at 499), the union has a legitimate interest in appealing to the former class of contractors, but not to the latter.

However, in the typical construction project situation there is no need to inquire whether the other contractors are performing work related to the normal operations of the contractor with whom the union has its primary dispute. While the tasks performed by the various crafts on a construction project are related in the sense that they all enter into the construction of the same facility and one often depends upon the completion of the other, under *Denver* the relation is not, as a matter of law, the equivalent of furnishing materials and services needed for the day-to-day operations of a struck plant.[7] Accordingly,

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[7] See Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1425, n. 292 (1962); see also J.A. 29.

the *Moore Dry Dock* criteria remain appropriate guides for determining whether the union's picketing at a construction project is primary or secondary.

In sum, *General Electric* was not intended to overrule or qualify *Denver* or to disturb the Board's prior practice of applying the *Moore Dry Dock* criteria to picketing at the typical construction project. Indeed, the Court in *General Electric* referred to *Denver* at least twice without in any way questioning its continuing vitality (366 U.S. at 672, 679),[8] and reviewed, with apparent approval, the Board's application of the *Moore Dry Dock* criteria to construction project cases (see 366 U.S. at 676-679).

4. Finally, in urging that the "related work" concept of *General Electric* is applicable to the relationship between the contractors on a construction project, petitioner seeks to obtain judicially the overruling of *Denver* which the building trades unions so far have been unable to obtain from Congress. See *National Labor Relations Board* v. *Nashville Bldg. &*

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[8] The dissenting judge in the court below asserted (Pet. App. 15a-16a) that, since the opinion of the Court in *Denver* merely focused on the fact that the various contractors on a construction project were independent legal entities and did not discuss the "*relatedness* of the subcontractor's work to the normal operations of the prime contractor," a reexamination of *Denver* in the light of *General Electric* was warranted. However, this overlooks the fact that the main thrust of the argument of the dissenters in *Denver* was that the work of the contractors on a construction project was so closely related that all of them should be viewed as one primary employer for purposes of Section 8(b)(4) (see note 3, *supra*).

Constr. Trades Council, 383 F. 2d 562, 564 (C.A. 6).[9] In light of this additional consideration, review by this Court of the issue raised by petitioner seems particularly inappropriate.

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[9] In 1954 the Senate Labor Committee reported out a bill which would have, *inter alia*, privileged construction site picketing, but the bill was recommitted (see S. Rep. No. 1211 on S. 2650, 83d Cong., 2d Sess., pp. 10-11). A provision privileging such picketing appeared in the bill reported out by the House Labor Committee in 1959 (H. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess., pp. 22-23, I Legis. Hist. of the LMRDA of 1959, pp. 780-781), but not in the substitute Landrum-Griffin bill adopted by the House. In the Conference Committee, the House and Senate conferees agreed to exempt the construction industry from the ban on "hot cargo" agreements in Section 8(e), but not to overrule *Denver* (see 105 Cong. Rec. 17900, II Legis. Hist. of the LMRDA of 1959, p. 1433 (Senator Kennedy); H. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 39, I Legis. Hist. of the LMRDA of 1959, p. 943). However, commitments were made to introduce "common situs" picketing bills at the next session (see II Legis. Hist. of the LMRDA of 1959, pp. 1387, 1434). In 1960, the House again reported out a bill which would have overruled *Denver* (see H. Rep. No. 1556 on H.R. 9070, 86th Cong., 2d Sess., Part 2, pp. 12-13), but it never came to the floor for a vote; nor did the "common situs" bills on which further House hearings were held in 1961 (see Hearings on Construction Site Picketing before the General Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess.). In the current session of Congress, the House has again reported out such a bill, but, as yet, it has not come to the floor for a vote (see H. Rep. No. 227 on H.R. 100, 90th Cong., 1st Sess.).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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